

Christopher R. Kaup, State Bar No. 014820
Laura L. Wochner, State Bar No. 032214



Seventh Floor, Camelback Esplanade II
2525 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 255-6000
Facsimile: (602) 255-0103
E-Mail: crk@tblaw.com; llw@tblaw.com
Attorneys for Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:

CLEAR ENERGY SYSTEMS, INC.,

Debtor.

Chapter 11

2:14-BK-12716-BKM

TRUSTEE'S MOTION TO APPROVE:
(1) STIPULATION FOR RELIEF FROM
THE AUTOMATIC STAY
AND
(2) STIPULATION FOR
ABANDONMENT OF DOCUMENTS
AND COMPUTER FILES TO
DISTRICT COURT LITIGATION
COUNSEL FOR THE DEBTOR

Chapter 11 Trustee, David Tiffany, by and through undersigned counsel, hereby moves this Court to approve the *Stipulation for Relief from the Automatic Stay* (the “Stay Relief Stipulation”), a copy of which is attached hereto as **Exhibit “1”**, and the *Stipulation for Abandonment of Documents and Computer Files to District Court Litigation Counsel for the Debtor* (the “Abandonment Stipulation”) a copy of which is attached hereto as **Exhibit “2”**.

Relief from the automatic stay is necessary pursuant to Section 362(a) of the Bankruptcy Code to permit the Debtor and its insurance carrier, Westchester Fire Insurance Company (“Westchester”) to attend and participate in a court ordered mediation and, hopefully, settle that case with money only from the directors and officers insurance policy

1 and to allow payments and/or advancement by Westchester of legal fees and costs, that are,
2 or will become, owing for CES's defense in the Lawsuit, as that term is defined below.

3 The proposed abandonment of documents and computer files to litigation counsel
4 for the Debtor is appropriate, pursuant to 11 U.S.C. §554(a), so that all of the documents,
5 files, and computer/electronically stored information from the Debtor's computers
6 (collectively the "Material") not sold and transferred to another party, effective as of March
7 31, 2016, will be placed in the sole custody of lawyers handling that litigation. This
8 Motion is more fully supported by the following Memorandum of Points and Authorities.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **Relief from the Automatic Stay**

11 Debtor is a defendant in an action entitled *Axxess Energy LLC v. Clear Energy*
12 *Systems, Inc.*, Civil Action No.: 2:15-CV-01831-MHB, pending in the United States
13 District Court for the District of Arizona (the "Lawsuit"). On August 14, 2015, this Court
14 approved a Stipulation (the "Axxess Stipulation") between Axxess Energy LLC
15 ("Axxess") and the Debtor granting Axxess relief from the automatic stay to commence the
16 Lawsuit against CES for recovery solely from a Westchester Insurance Policy. [Doc. 205].
17 Westchester issued ACE EXPRESS Private Company Management Indemnity Package
18 Policy No. G24099283 004 issued to CES for the Policy Period of November 12, 2012 to
19 November 12, 2013. The Policy contains an aggregate Limit of Liability of \$5,000,000.00,
20 including defense costs. Insuring Clauses A.2 and A.3 have a \$5,000.00 Retention for each
21 Claim. Subject to the terms of the Policy, it is the Westchester's duty to defend Claims.

22 The Axxess Stipulation, to which Westchester was not a party, did not provide that,
23 pursuant to the terms of the Policy, any amounts paid by Westchester to defend claims,
24 including the Lawsuit, reduce the Limits of Liability of the Policy. Consequently, the
25 Court's Order does not provide that the automatic stay was lifted to permit Westchester to
26 advance any defense costs for the Lawsuit or to fund any settlement.

1 Having allowed Axxess relief from the stay to bring the Lawsuit against CES, it is
2 only fair and reasonable that the Court grant the requested relief to enable Westchester to
3 provide CES with a defense to that Lawsuit and/or to use the Policy proceeds to enable
4 Westchester to engage in good faith settlement negotiations with respect to the Lawsuit.
5 There will be no prejudice to any creditors of the Estate since all attorneys' fees, costs, and
6 expenses will be paid only from the Policy

7 In the Stay Relief Stipulation Westchester and Debtor request the Court to enter an
8 Order granting relief from the automatic stay, to the extent that it applies, to allow
9 payments and/or advancement by Westchester of funds necessary to pay for the Debtor's
10 defense in the Lawsuit pursuant to the Policy. Westchester and Debtor also seek to have
11 the stay modified to permit Westchester, in its sole discretion, to use proceeds of the Policy
12 to fund a settlement of the Lawsuit. A court ordered mediation is set for the end of March,
13 2016. Westchester and Debtor also ask the Court waive the requirements of Bankruptcy
14 Rule 4001(a)(3) and direct that the Order granting the requested relief be effective
15 immediately.

16 Cause exists under section 362(d)(1) of the Bankruptcy Code, for granting relief
17 from the stay to permit Westchester to advance insurance proceeds to pay for the fees and
18 costs incurred by the Debtor to defend the Lawsuit. In addition, stay relief is appropriate to
19 permit Westchester to use proceeds from the Policy proceeds to funds a settlement of the
20 Lawsuit.

21 **Abandonment of Documents and Computer Files to District Court Litigation Counsel**
22 **for the Debtor**

23 The Trustee expects to conduct an auction of all of the assets of the Estate on March
24 23, 2016 (the "Auction"). All of the documents, files, and computer/electronically stored
25 information download from the Estate's Computers by the Trustee (collectively the
26 "Material") belonging to the Estate may be transferred to one or more buyers at that time.

1 If the Material is not transferred to a third party at that time, the Trustee may dispose of it.
2 A portion or all of the Material may relate to or bear on the issues in the Litigation.
3 Counsel for Debtor in the Litigation, the law firm of Manning & Kass, Ellrod, Ramirez,
4 Trester LLP ("MKERT"), and the Trustee desire to ensure that all of the Material is
5 protected and preserved for the benefit of the parties in the Law Suit. In the event the
6 Trustee is not able to sell the Material, it is clear it will be of inconsequential value to the
7 Estate. In addition, it would be costly and burdensome for the Estate to store the Material.

8 Therefore, in the Abandonment Stipulation the Trustee and MKERT request the
9 Court to permit MKERT or its designee to collect and transport all the Material (including
10 a copy of the computer/electronically stored information downloaded from the Estate's
11 computers) to MKERT's offices as soon as practicable after the Court approves this
12 Stipulation. Thereafter, MKERT will take custody and control of the Materials; provided,
13 however, that MKERT shall allow the purchaser of the assets of the estate (the
14 "Purchaser") prior to close of business March 31, 2016, to review the Materials at the
15 MKERT office and allow the Purchaser to remove and retain such Material as the
16 Purchaser desires after MKERT makes copies of any such Materials that MKERT
17 determines may relate to or bear on the issues in the Case prior to removal by the
18 Purchaser.

19 The Trustee requests the Court approve the Abandonment Stipulation providing that
20 (1) the Trustee shall abandon all of the Material to MKERT, not sold and transferred to
21 another party, effective as of March 31, 2016 and, thereafter, MKERT will take possession
22 of and have sole custody and control of the Material as of March 31, 2016; (2) MKERT
23 may make copies of all or any portion of the Material to provide to Axxess and its counsel
24 pursuant to the Federal Rules of Civil Procedure; and (3) Axxess and its counsel shall have
25 the right to obtain discovery pursuant to the Federal Rules of Civil Procedure of any non-
26 privileged portion of the Material in the Case.

1 Therefore, cause exists pursuant to 11 U.S.C. §554(a), for the Court to authorize the
2 Trustee to abandon all of the Material to MKERT on the terms and conditions set forth in
3 the Stipulation.

4 **Conclusion**

5 The proposed abandonment of documents and computer files to District Court
6 litigation counsel for the Debtor and relief from the automatic stay are in the best interests
7 of the Bankruptcy Estate. Therefore, it is appropriate for the Court to enter its Order
8 approving the Stay Relief Stipulation and an Order approving the Abandonment
9 Stipulation.

10 RESPECTFULLY SUBMITTED this 10th day of March, 2016

11  **TIFFANY & BOSCO**
P.A.

12
13 By: /s/ Christopher R. Kaup
14 Christopher R. Kaup, Esq.
15 Laura L. Wochner, Esq.
16 Seventh Floor Camelback Esplanade II
17 2525 East Camelback Road
18 Phoenix, Arizona 85016
19 *Attorneys for Trustee*

20 **FOREGOING** electronically filed with
21 Bankruptcy Court on this 10th day of
22 March, 2016; and

23 **COPIES** (Judge BKM) served by mail
24 or email on this or the next business
25 day to:

26 Shelton L. Freeman
Freeman Huber Law PLLC
6909 E Main Street
Scottsdale, AZ 85251
Email: bkfilings@flfz.com
Attorneys for Debtor

Clear Energy Systems, Inc.
1245 W. Geneva Drive
Tempe, AZ 85282
Debtor

1 Thomas A. Pitta, Esq.
2 Emmet, Marvin & Martin, LLP
3 120 Broadway, 32nd Floor
4 New York, New York 10271
5 Email: tpitta@emmetmarvin.com
6 *The Bank of New York Mellon*

7 William Novotny
8 Dickinson Wright PLLC
9 1850 North Central Avenue, Suite 1400
10 Phoenix, Arizona 85004
11 E-mail: wnovotny@dickinsonwright.com
12 *Attorneys for Arizona Commerce*
13 *Authority*

14 Dale C Schian, Esq.
15 Schian Walker, P.L.C.
16 1850 North Central Avenue, #900
17 Phoenix, Arizona 85004-4531
18 E-mail: ecfdocket@swazlaw.com
19 *Attorneys for TEC International LLC*

20 Trevor J. Young, Esq.
21 Mulliken Weiner Berg & Jolivet P.C.
22 102 S. Tejon Street, Suite 900
23 Colorado Springs, Colorado 80903
24 Email: young@mullikenlaw.com
25 *Attorneys for Axxess Energy, LLC*

26 Matthew A. Silverman
April J. Theis
Christopher J. Dylla
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Email: matthew.silverman@azag.gov
Email: april.theis@azag.gov
Email: christopher.dylla@azag.gov
Attorneys for the State of Arizona
ex rel. Arizona Department of Revenue

William Scott Jenkins
Carl Kunz
Myers & Jenkins, P.C.
One East Camelback Road, Suite 500
Phoenix, Arizona 85012
Email: wsj@mjlegal.com
Email: ckunz@morrisjames.com
Attorneys for DCT – AZ 2004 RN Portfolio U, LLC

Randy J. Aoyama, Esq.
Michael R. Ayers, Esq.
Hinshaw & Culbertson, LLP
2375 E. Camelback Road, Suite 750
Phoenix, Arizona 85016
Email: raoyama@hinshawlaw.com
Email: mayers@hinshawlaw.com
Counsel for Westchester Fire Insurance Company

Dean C. Waldd, Esq.
Grant L. Cartwright, Esq.
Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Email: waldtd@ballardspahr.com
Email: cartwrightg@ballardspahr.com
Counsel for William J. Post

James S. Samuelson, Esq.
SACKS TIERNEY P.A.
4250 N. Drinkwater Boulevard, Fourth Floor
Scottsdale, Arizona 85251
Email: james.samuelson@sackstierney.com
Attorneys for Axxess Energy, LLC

Patty Chan
Office Of The U.S. Trustee
230 North First Avenue, Suite 204
Phoenix, AZ 85003
Email: Patty.Chan@usdoj.gov
U.S. Trustee

1 All email recipients as approved under
2 the Court's ORDER APPROVING
ELECTRONIC SERVICE (Doc 164)

3 By: /s/ Louis A. Lofredo

Exhibit “1”

Christopher R. Kaup, State Bar No. 014820
Laura L. Wochner, State Bar No. 032214



TIFFANY & BOSCO
P.A.

Seventh Floor, Camelback Esplanade II
2525 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 255-6000
Facsimile: (602) 255-0103
E-Mail: crk@tblaw.com; llw@tblaw.com
Attorneys for Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:

Chapter 11

CLEAR ENERGY SYSTEMS, INC.,

2:14-BK-12716-BKM

Debtor.

**STIPULATION FOR RELIEF FROM
THE AUTOMATIC STAY**

David Tiffany, the duly appointed Chapter 11 Trustee in this case, Westchester Fire Insurance Company (“Westchester”) and Debtor, Clear Energy Systems, Inc. (“CES”), through David Tiffany, the duly appointed Chapter 11 Trustee, submit this stipulation (the “Stipulation”) pursuant to 11 U.S.C. §§ 362(d), and 105(a), and Fed. R. Bank. P. 4001(a) and 9014, for an Order (1) that the automatic stay imposed by 11 U.S.C. § 362(a), to the extent applicable to Policy No. G24099283 004 issued by Westchester to CES for the policy period from November 12, 2012 to November 12, 2013 (the “Policy”), is modified so as to permit Westchester to reimburse, as it deems appropriate, “Costs, Charges and Expenses,” as defined by the Policy, incurred by CES in connection with adversary proceeding entitled Axxess Energy LLC v. Clear Energy Systems, Inc., Civil Action No.: 2:15-cv-01831-MHB, U.S. District Court, District of Arizona (the “Lawsuit”); (2) that any such payment of the Costs, Charges and Expenses by Westchester shall reduce the Policy’s aggregate Limit of Liability in a like amount as provided in the Policy; and (3) that the automatic stay imposed by 11 U.S.C. §

1 362(a), to the extent applicable, does not bar Westchester from using the proceeds of the Policy to
2 negotiate and/or fund a compromise or settlement of the Lawsuit.

3 Recitals

4 1. The Court has jurisdiction over the subject matter of this Stipulation pursuant to
5 28 U.S.C. §§ 157 and 1334. This is a core proceeding arising under Chapter 11 of the United States
6 Bankruptcy Code, 11 U.S.C. § 101, et seq., that the Court has authority to hear and determine pursuant
7 to 28 U.S.C. § 157(b)(2).

8 2. On August 14, 2015, this Court So Ordered a Stipulation between Axxess
9 Energy LLC (“Axxess”) and the Debtor granting Axxess relief from the automatic stay to commence
10 the Lawsuit against CES for recovery solely from the Westchester Policy. (Doc. 205)

11 3. The Stipulation, to which Westchester was not a party, did not state that,
12 pursuant to the terms of the Policy, any amounts paid by Westchester to defend claims, including the
13 Lawsuit, reduce the Limits of Liability of the Policy. Consequently, the Court’s Order does not
14 provide for lifting the automatic stay to permit Westchester to advance any defense costs for the
15 Lawsuit or to fund any settlement.

16 4. Axxess filed its complaint in the Lawsuit on September 14, 2015.

17 5. Westchester has reserved its rights to deny coverage for the lawsuit based on
18 various terms, conditions, and exclusions of the Policy, and is providing CES with a defense subject to
19 that reservation of rights.

20 Background

21 The Policy

22 6. Westchester issued ACE EXPRESS Private Company Management Indemnity
23 Package Policy No. G24099283 004 issued to CES for the Policy Period of November 12, 2012 to
24 November 12, 2013. The Policy contains an aggregate Limit of Liability of \$5,000,000, including
25 Defense Costs. Insuring Clauses A.2 and A.3 have a \$5,000 Retention for each Claim. Subject to the
26 terms of the Policy, it is the Insurer’s duty to defend Claims.

1 7. Insuring Clause A.3. of the Policy (subject to its terms, provisions, conditions,
2 and exclusions) provides that Westchester “shall pay the Loss of [CES] which [CES] becomes legally
3 obligated to pay by reason of a Claim first made against [CES] during the Policy Period...and reported
4 to [Westchester]...”¹

5 8. “Loss is defined in the Policy to include “damages, judgments, settlements . . .
6 and Costs, Charges and Expenses.” This includes, in pertinent part, “reasonable and necessary legal
7 costs, charges, fees and expenses” incurred by the Insurer, or by any Insured with the Insurer’s
8 consent, in defending Claims. The payments of Loss, including Costs, Charges and Expenses, will
9 thus reduce the Policy’s aggregate limit of liability.

10 9. The Policy also contains a “Payment Priority” provision, which requires
11 Westchester to pay Loss, including Costs, Charges and Expenses, incurred by any Directors and/or
12 Officers under the D&O Coverage Insuring Clause A.1. prior to paying Loss incurred by the
13 Company. Then with respect to whatever remaining amount of the Limit of Liability is available after
14 payments of such Loss, Westchester may pay Loss incurred by CES. Because no Claims against CES
15 Directors or Officers have been submitted to Westchester, the Priority of Payments provisions does
16 not presently apply.

17 10. To date, counsel appointed to defend CES in the Lawsuit has incurred Costs,
18 Charges and Expenses for the defense of CES.

19 **The Lawsuit**

20 11. The Complaint in the Lawsuit alleges that Axxess Energy LLC (“Axxess”),
21 Grand Creek Ranch Legacy Trust (“Grand Creek”), and VP, LLC (“VP”) were induced to purchase
22 common stock of CES for the total price of \$3,000,000 as a result of misrepresentations concerning
23 the operational viability of, and amount of purchase orders for, an engine being developed by CES.
24 Subsequently, Axxess, Grand Creek, and VP learned of the misrepresentations and demanded

25 ¹ Insuring Agreement A.1, which applies to Loss incurred by CES’s Directors and Officers for which they
26 are not indemnified by the Company, and Insuring Agreement A.2, which reimburses CES for Loss it pays as a
result of an indemnification obligation it owes to its Directors and Officers, do not apply to this matter. The
Complaint in the Lawsuit does not name any Directors or Officers as defendants.

1 rescission of their investments. CES refused. Grand Creek and VP assigned their rights, title, and
2 interest in their stock to Axxess. The Complaint contains a single count sounding in negligent
3 misrepresentation.

4 12. A settlement conference has also been scheduled in this matter for March 29,
5 2016.

6 **Stipulation to Modify the Automatic Stay**

7 13. It is well settled that insurance policies are property of the estate and covered by
8 the automatic stay provisions of the Bankruptcy Code. See Liberty Mut. Ins. Co. v. Official
9 Unsecured Creditors' Comm. Of Spaulding Composites Co. (In re Spaulding Composites Co.), 207
10 B.R. 899, 907 (B.A.P. 9th Cir. 1997).

11 14. However, in the present case, cause exists under section 362(d)(1) of the
12 Bankruptcy Code, for granting relief from the stay to permit Westchester to advance Costs, Charges
13 and Expenses incurred by CES to defend the Lawsuit.

14 15. Having allowed Axxess relief from the stay to bring the Lawsuit against CES, it
15 is only fair and reasonable that the Court grant the requested relief to enable Westchester to provide
16 CES with a defense to that Lawsuit and/or to use the Policy proceeds to enable Westchester to engage
17 in good faith settlement negotiations with respect to the Lawsuit.

18 16. Section 105 of the Bankruptcy Code authorizes this Court to "issue any order,
19 process, or judgment that is necessary or appropriate to carry out the provisions of this title." The
20 purpose of Section 105 is to assure the bankruptcy court's power to take whatever action is appropriate
21 or necessary in aid of the exercise of its jurisdiction. 2 Collier on Bankruptcy ¶ 105.01 at 105-5 through
22 105-6 (15th ed. Rev. 2000).

23 17. Permitting Westchester to pay the Costs, Charges and Expenses, pursuant to the
24 Policy's express language and to use Policy proceeds to attempt to negotiate a settlement of the
25 Lawsuit, is clearly appropriate in these circumstances.

1 18. Westchester and Debtor hereby stipulate and request the Court to enter an Order
2 granting relief from the automatic stay provided for in section 362(a) of the Bankruptcy Code, to the
3 extent that it applies, to allow payments and/or advancement by Westchester of Costs, Charges and
4 Expenses that are, or will become, owing for CES's defense in the Lawsuit pursuant to the Policy.

5 19. Westchester and Debtor further request the Court to enter an order modifying
6 the automatic stay to permit Westchester, in its sole discretion, to use proceeds of the Policy in
7 negotiating and/or funding a compromise or settlement of the Lawsuit.

8 20. Westchester and Debtor further request that the Court waive the requirements of
9 Bankruptcy Rule 4001(a)(3) and direct that the Order granting the requested relief be effective
10 immediately.

11 **Dated: March __, 2016**

12 **TIFFANY & BOSCO, P.A**

13 /s/ Christopher R. Kaup
14 Christopher R. Kaup
15 Camelback Esplanade II
16 2525 E. Camelback Rd., Seventh Floor
17 Phoenix, AZ 85016
18 Telephone: 602-255-6024
19 *Counsel for the Trustee*

COZEN O'CONNOR

/s/ Amanda Lorenz
 Amanda Lorenz SBN 021902
 501 West Broadway, Ste. 1610
 San Diego, CA 92101
 Telephone: 619-234-1700
 Facsimile: 619-234-7831
 Counsel for
 Westchester Fire Insurance Company

18 **FOREGOING** electronically filed with
19 Bankruptcy Court on this __ March,
20 2016; and

21 **COPIES** (Judge BKM) served by mail
22 or email on this or the next business
23 day to:

24 Shelton L. Freeman
25 Freeman Huber Law PLLC
6909 E Main Street
Scottsdale, AZ 85251
Email: bkfilings@flfaz.com
Attorneys for Debtor

Clear Energy Systems, Inc.
1245 W. Geneva Drive
Tempe, AZ 85282
Debtor

1 Thomas A. Pitta, Esq.
2 Emmet, Marvin & Martin, LLP
3 120 Broadway, 32nd Floor
4 New York, New York 10271
5 Email: tpitta@emmetmarvin.com
6 *The Bank of New York Mellon*

7 William Novotny
8 Dickinson Wright PLLC
9 1850 North Central Avenue, Suite 1400
10 Phoenix, Arizona 85004
11 E-mail:
12 wnovotny@dickinsonwright.com
13 *Attorneys for Arizona Commerce*
14 *Authority*

15 Dale C Schian, Esq.
16 Schian Walker, P.L.C.
17 1850 North Central Avenue, #900
18 Phoenix, Arizona 85004-4531
19 E-mail: ecfdocket@swazlaw.com
20 *Attorneys for TEC International LLC*

21 Trevor J. Young, Esq.
22 Mulliken Weiner Berg & Jolivet P.C.
23 102 S. Tejon Street, Suite 900
24 Colorado Springs, Colorado 80903
25 Email: young@mullikenlaw.com
26 *Attorneys for Axxess Energy, LLC*

Matthew A. Silverman
April J. Theis
Christopher J. Dylla
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Email: matthew.silverman@azag.gov
Email: april.theis@azag.gov
Email: christopher.dylla@azag.gov
Attorneys for the State of Arizona
ex rel. Arizona Department of Revenue

William Scott Jenkins
Carl Kunz
Myers & Jenkins, P.C.
One East Camelback Road, Suite 500
Phoenix, Arizona 85012
Email: wsj@mjlegal.com
Email: ckunz@morrisjames.com
Attorneys for DCT – AZ 2004 RN Portfolio U, LLC

Randy J. Aoyama, Esq.
Michael R. Ayers, Esq.
Hinshaw & Culbertson, LLP
2375 E. Camelback Road, Suite 750
Phoenix, Arizona 85016
Email: raoyama@hinshawlaw.com
Email: mayers@hinshawlaw.com
Counsel for Westchester Fire Insurance Company

Dean C. Waldt, Esq.
Grant L. Cartwright, Esq.
Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Email: waltdt@ballardspahr.com
Email: cartwrightg@ballardspahr.com
Counsel for William J. Post

James S. Samuelson, Esq.
SACKS TIERNEY P.A.
4250 N. Drinkwater Boulevard, Fourth Floor
Scottsdale, Arizona 85251
Email: james.samuelson@sackstierney.com
Attorneys for Axxess Energy, LLC

Patty Chan
Office Of The U.S. Trustee
230 North First Avenue, Suite 204
Phoenix, AZ 85003
Email: Patty.Chan@usdoj.gov
U.S. Trustee

1 All email recipients as approved under
2 the Court's ORDER APPROVING
3 ELECTRONIC SERVICE (Doc 164)

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22
23
24
25
26
By: /s/

Exhibit “2”

Christopher R. Kaup, State Bar No. 014820
Laura L. Wochner, State Bar No. 032214



Seventh Floor, Camelback Esplanade II
2525 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 255-6000
Facsimile: (602) 255-0103
E-Mail: crk@tblaw.com; llw@tblaw.com
Attorneys for Trustee

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re:

Chapter 11

CLEAR ENERGY SYSTEMS, INC.,

2:14-BK-12716-BKM

Debtor.

**STIPULATION FOR ABANDONMENT OF
DOCUMENTS AND COMPUTER FILES TO
DISTRICT COURT LITIGATION COUNSEL
FOR THE DEBTOR**

David Tiffany, the duly appointed Chapter 11 Trustee in this case, the law firm of Manning & Kass, Ellrod, Ramirez, Trester LLP (“MKERT”), which represents the Debtor, Clear Energy Systems, Inc., solely in the action entitled *Axxess Energy LLC v. Clear Energy Systems, Inc.*, Civil Action No.: 2:15-CV-01831-MHB, U.S. District Court, District of Arizona (the “Case”) and solely for purposes of defending Clear Energy Systems, Inc. in the Case hereby stipulate and agree as follows:

1. Axxess is the plaintiff and the Debtor is a defendant in the Case;
2. Debtor’s defense is being paid for by Westchester Fire Insurance Company under a prepetition policy of Directors & Officers Insurance;
3. The Case is early in the discovery stage;
4. The Trustee expects to conduct an auction of all of the assets of the estate on March 23, 2016 (the “Auction”). All of the documents, files, and computer/electronically stored information download from the Estate's Computers by the Trustee (collectively the “Material”)

1 belonging to the Estate may be transferred to one or more buyers at that time. If the Material is not
2 transferred to a third party at that time, the Trustee may dispose of it;

3 5. A portion or all of the Material may relate to or bear on the issues in the Case.
4 MKERT and the Trustee desire to ensure that all of the Material is protected and preserved for the
5 benefit of the parties in the Law Suit;

6 6. In the event the Trustee is not able to sell the Material, it is clear it will be of
7 inconsequential value to the Estate. In addition, it would be costly and burdensome for the Estate
8 to store the Material;

9 **THEREFORE, IT IS AGREED AS FOLLOWS,**

10 1. The Trustee shall permit MKERT or its designee to collect and transport all the
11 Material (including a copy of the computer/electronically stored information download from the
12 Estate's Computers by the Trustee) to MKERT's offices located at 3636 N. Central Avenue, 11th
13 Floor, Phoenix, AZ 85012, for safe keeping as soon as practicable after the Court approves this
14 stipulation. Thereafter, MKERT will take custody and control of the Materials; provided,
15 however, that MKERT shall allow the purchaser of the assets of the estate (the "Purchaser") prior
16 to close of business March 31, 2016, to review the Materials at the MKERT office and allow the
17 Purchaser to remove and retain such Material as the Purchaser desires after MKERT makes copies
18 of any such Materials that MKERT determines may relate to or bear on the issues in the Case prior
19 to removal by the Purchaser.

20 2. The Trustee shall abandon, pursuant to 11 U.S.C. §554(a), all of the Material to
21 MKERT, not sold and transferred to another party, effective as of March 31, 2016 and, thereafter,
22 MKERT will take possession of and have sole custody and control of the Material as of March 31,
23 2016.

24 3. MKERT may make copies of all or any portion of the Material to provide to Axxess
25 pursuant to the Federal Rules of Civil Procedure;

1 4. Axxess shall have the right to obtain discovery pursuant to the Federal Rules of
2 Civil Procedure of any non-privileged portion of the Material in the Case.

3 **Dated: March __, 2016**

4 **TIFFANY & BOSCO, P.A**

**MANNING & KASS, ELLROD,
RAMIREZ, TRESTER LLP**

6 /s/ Christopher R. Kaup
7 Christopher R. Kaup

/s/ Anthony Vitagliano
Robert B. Zelms

8 Camelback Esplanade II
2525 E. Camelback Rd., Seventh Floor
9 Phoenix, AZ 85016
10 *Counsel for the Trustee*

Anthony S. Vitagliano
3636 N. Central Avenue, 11th Floor
Phoenix, AZ 85012

*Counsel for Clear Energy Systems,
Inc. in Civil Action No.: 2:15-CV-
01831-MHB*

11
12
13 **FOREGOING** electronically filed with
14 Bankruptcy Court on this __ day of
March, 2016; and

15 **COPIES** (Judge BKM) served by mail
16 or email on this or the next business
day to:

17 Shelton L. Freeman
18 Freeman Huber Law PLLC
6909 E Main Street
19 Scottsdale, AZ 85251
Email: bkfilings@flfaz.com
20 *Attorneys for Debtor*

Clear Energy Systems, Inc.
1245 W. Geneva Drive
Tempe, AZ 85282
Debtor

21 Thomas A. Pitta, Esq.
22 Emmet, Marvin & Martin, LLP
120 Broadway, 32nd Floor
23 New York, New York 10271
Email: tpitta@emmetmarvin.com
24 *The Bank of New York Mellon*

William Scott Jenkins
Carl Kunz
Myers & Jenkins, P.C.
One East Camelback Road, Suite 500
Phoenix, Arizona 85012
Email: wsj@mjlegal.com
Email: ckunz@morrisjames.com
Attorneys for DCT – AZ 2004 RN Portfolio U, LLC

William Novotny
Dickinson Wright PLLC
1850 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
E-mail:
wnovotny@dickinsonwright.com
*Attorneys for Arizona Commerce
Authority*

Dale C Schian, Esq.
Schian Walker, P.L.C.
1850 North Central Avenue, #900
Phoenix, Arizona 85004-4531
E-mail: ecfdocket@swazlaw.com
Attorneys for TEC International LLC

Trevor J. Young, Esq.
Mulliken Weiner Berg & Jolivet P.C.
102 S. Tejon Street, Suite 900
Colorado Springs, Colorado 80903
Email: young@mullikenlaw.com
Attorneys for Axxess Energy, LLC

Matthew A. Silverman
April J. Theis
Christopher J. Dylla
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Email: matthew.silverman@azag.gov
Email: april.theis@azag.gov
Email: christopher.dylla@azag.gov
*Attorneys for the State of Arizona
ex rel. Arizona Department of Revenue*

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By: /s/ Louis A. Lofredo

Randy J. Aoyama, Esq.
Michael R. Ayers, Esq.
Hinshaw & Culbertson, LLP
2375 E. Camelback Road, Suite 750
Phoenix, Arizona 85016
Email: raoyama@hinshawlaw.com
Email: mayers@hinshawlaw.com
Counsel for Westchester Fire Insurance Company

Dean C. Waldt, Esq.
Grant L. Cartwright, Esq.
Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Email: waldtd@ballardspahr.com
Email: cartwrightg@ballardspahr.com
Counsel for William J. Post

James S. Samuelson, Esq.
SACKS TIERNEY P.A.
4250 N. Drinkwater Boulevard, Fourth Floor
Scottsdale, Arizona 85251
Email: james.samuelson@sackstierney.com
Attorneys for Axxess Energy, LLC

Patty Chan
Office Of The U.S. Trustee
230 North First Avenue, Suite 204
Phoenix, AZ 85003
Email: Patty.Chan@usdoj.gov
U.S. Trustee